Rex (W. E.)

WILL CONTESTS

By WALTER E REX Esq.

Formerly Register of Wills for the City and County of Philadelphia

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It will be impossible, if indeed not inappropriate for the purposes of this paper, to attempt to do more than to suggest a few leading thoughts that naturally arise in the discussion of this subject. The title may be misleading, for, in order to speak of the principles bearing upon the question of the amount of mental capacity required to make a valid will, it will be necessary for me to carry you away, at first, from the scenes of strife, with their accompanying displays of eloquence, which the title suggests, and to lay before you some facts and elementary principles concerning wills and who may make them.

A will is defined to be the legal declaration of a man's intentions concerning the disposition of his property after his death.

In England, wills of personal property, or goods and chattels, were of very ancient origin; but a testator could only dispose of one-half or one-third, according as he left only a wife, or a wife and children, who were entitled to their "reasonable parts," as they were called.

The power to devise land by will was given by statute in the time of Henry VIII, although it is said to have existed before the Conquest. It originated in the fertile minds of the ecclesiastics, who were desirous of adding to the wealth and power of the Church; they separated the use of land from the land itself, and made the use the subject of devise, while the land was not. This caused the passage of a statute annexing the use to the land, and this was shortly followed by the statute of Henry VIII above mentioned.

Among the ancient Athenians, there was no law giving the right to dispose of property or lands by will, but they descended to children and in default of these, to collateral heirs. The object of this custom was to prevent inequality of wealth, and to promote its more general distribution.

In Germany, it was for a long time disputed whether property should go to the children of a decedent, or to his parents; and, in order to decide the question, about the middle of the tenth century a trial by combat was ordered, which resulted in a victory for the champions of the children.

After wills became a recognized and legal method of disposing of property, there were still several classes of persons who were not allowed to make them—viz., married women, infants, idiots and persons of non-sane memory.

The laws of our State, however, have, since the year 1848, removed this disability from married women, but the other classes still remain under it.

The object of this paper is to deal with the class last above named—mainly, however, with reference to the amount of mental capacity required to make a valid will.

Of course, if the persons denominated as idiots and of non-sane memory were openly and notoriously in a condition requiring treatment and confinement for their mental troubles, there might be little or no difficulty in determining the validity of their testamentary dispositions. But it is rarely in these cases that the legal machinery of the courts is called into use.

The cases over which the most vigorous contests arise are those where the testator lived and moved among his companions and friends, attending to his daily duties, riding his hobbies, growing close and peculiar, perhaps, with advancing years, and when at last overtaken by death and his will is read, immediately a contest is begun by disappointed relatives and friends, on the grounds of "want of mental capacity" and "undue influence."

It would be most singular and unaccountable (if we did not recognize avarice, envy and disappointment as the inducing causes) that men who are looked up to in the business world,

whose judgment is consulted, who are respected and honored, and of whom no suspicion of mental unsoundness was ever breathed, should immediately after death have their private actions brought to light and scrutinized, their conversations distorted, and their peculiarities magnified, in the effort to discover something of which the law may take hold, and by means of which their testamentary wishes may be pronounced void.

This brings me to the point at which I may consider the subject in two aspects; one, the common or popular idea of what constitutes mental incapacity; and the other, what the law regards as such.

Briefly as to the first, Disappointment (concealed, of course) is usually the moving cause for a contest. If an estate is not properly and equitably divided among those who feel themselves entitled to it, or an expectant legatee is passed over with a small gift, or perhaps with none at all, or the estate is left entirely to strangers or to charity, then the expectant beneficiary falls a prey to his feelings, and seeks for proofs of insanity of the decedent.

Then woe betide the unfortunate testator who has ever talked to himself on the street or in the house, or mumbled incoherently and gesticulated to himself; who ever gave way to fits of temper, or refused to answer questions at times as though he did not hear, or only answered in monosyllables; who had lost or failing memory on many things; who disliked society; who did not recognize people on the street, and seemed to forget old friends and relatives; or who dressed poorly and meanly when he could do better; or who grew thin and emaciated as old age crept over him.

Any one or more of these facts, proven by a host of witnesses (and they can always be obtained), are sufficient, in the popular mind, to brand the decedent as unfit to dispose of his own estate. These witnesses always believe, and so testify when asked for their opinion upon facts such as the foregoing, that the testator was out of his mind, was unsound, was unfit to make a will, was crazy.

In one case, a woman who had been a cook all her life, and had accumulated a small estate by industry, savings and gifts, left it all to a church friend who had been kind to her in her last years. Her relatives, who had not gone near her for five years, contested the will. They testified to her ungovernable temper, her queer ways and penurious habits; but the crowning testimony showing her insanity was, that when she visited her relatives some years before the will was made, she refused to eat the bread and butter they gave her, and said it was bad, when they knew it was good, for they made it.

In another case, a son testified that his father was a raving maniac, because, among other things, he told the son he had been drinking. This accusation the son stoutly denied, but, as the father could not return to life and give his version of it, I could not help feeling that there was, perhaps, a scintilla of truth in the decedent's statement.

In nearly every contest, some of the above enumerated actions and conditions of body and mind are testified to, and adduced as evidences of unfitness to make a will.

In some instances, men who have not hesitated to deal with the decedent in his lifetime, and make business contracts with him, have been produced to testify to some of the actions and conditions above mentioned, and from them have given as their opinions that the testator was not fit to make a will.

A woman left her small estate to her husband for life, and after his death to charity, and cut off entirely a son whom the testimony showed to be worthless and ungrateful. Two men had signed as witnesses when the will was executed, and yet both testified that the woman was of unsound mind, although they said she knew what she was doing when she signed the will, and had asked them to witness it.

Upon cross-examination, it appeared that they based their opinion of her insanity solely upon the fact that they learned, after witnessing the will, that she had disinherited her son.

Nor is a man entirely safe, even when he obtains a physician as a witness. An old gentleman, who for many years had successfully conducted a manufacturing business, made his will very carefully. He afterward suffered from a stroke of paralysis, and was laid aside for a few months. Recovering, he attended to business as usual, and then added a codicil to his will, which was witnessed by two persons. He then took the codicil to his physician, a well-known practitioner, who wrote below the attestation clause that he considered him to be a man of perfectly sound mind.

The will and codicil favored several unmarried

daughters more than a son and married daughter, and gave good reasons for the discrimination. After his death, his will was hotly contested for more than a year; and testimony showing failing memory, absent-mindedness, business mismanagement, queer remarks and actions, was produced, to prove his mental incapacity; but, nevertheless, the will was sustained and probated.

These are a few of many instances which I might cite for the purpose of illustrating my first point—the popular idea of mental incapacity. In the judgment of the class of persons here alluded to, an old and well-known adage would be more nearly correct if it read: "Where there's a will that don't suit us, there ought to be a way to break it."

Fortunately, the interpretation placed by the courts upon what is necessary to constitute soundness of mind in the making of wills is very different from theirs. And although it is impossible to prevent contests on this ground under our laws and practice, yet the number of contests is small in proportion to the number of wills probated, and the number of wills set aside is very small indeed in proportion to the contests, as I will show you later on.

The general principle enunciated by the Supreme Court is that "A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty;" *i. e.*, Did he know what property he had? Did he know how he wanted to dispose of it? Did he know who his beneficiaries were?

The main question in such a controversy is whether the testator's mind and memory were sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will.

Merely imperfect, or impaired memory, or personal peculiarities and eccentricities, or habits and actions which have grown upon a man and are foreign to his former nature, are not of themselves sufficient to make out a case of mental incapacity. Neither age, nor sickness, nor extreme distress, nor debility of body, will affect the capacity to make a will, if sufficient intelligence remains.

A case which to the popular mind would seem to embody all the essentials of incapacity to make a will was decided by the Supreme Court in 1882 (*Wilson* v. *Mitchell*, 5 Outerbridge, 495). The testator was over 100 years old when he made his will. He had a paralytic stroke about ten years before his death. He was blind, had impaired hearing, his mind acted slowly, he was forgetful of recent events and names, he repeated questions in conversation, he slept constantly, and was bewildered when aroused suddenly. He became filthy and even obscene in his habits, although formerly very particular and correct.

Many who knew him, on account of these changes which they observed in him, testified that he did not have capacity to make a will. And yet the testimony of the witnesses to the will, and of others, showed so conclusively that he knew what he was doing at the time he executed his will, that the court withdrew the question of testamentary capacity from the jury, and the Supreme Court affirmed the judgment.

Many cases like this might be cited, but the principle is the same in all. A great safeguard thrown around wills is that the evidence of mental incapacity must be such as would satisfy the judge, and warrant him in allowing the jury to pass upon it. The subscribing witnesses to a will are permitted to state their opinions of the soundness of mind, etc., of the testator, without giving facts on which such opinion is based; but no other person (who is not an expert) can give such opinion without first stating the facts; and even then, the question whether the facts testified to justify the opinion given, and entitle such opinion to go to the jury, is for the court alone to decide.

The test to be applied in such case is whether the evidence is sufficient and of such character for the court to sustain a verdict against the will; if it is not, then the judge must withdraw the question from the jury; it would be error in him to allow the jury to pass on it, and he alone must decide the question of its sufficiency. Again, the facts testified to, as showing incapacity, must have happened at or about the time of the execution of the will.

It is not sufficient to relate incidents which transpired long before or long after the signing; neither exhibitions of mental weakness nor paralytic strokes at some remote period will, of themselves, change the presumption of sanity. A man is presumed to be sane until the contrary

is proved, and testimony of the nature hereinbefore mentioned will not constitute such proof.

Another frequent cause of contest is the allegation of undue influence. If the testator is proved to be a person of very weak mind, much less proof of undue influence is required to make out a case. But in ordinary cases, to establish undue influence requires proof of fraud, threats or misrepresentations, undue flattery, or physical or moral coercion, so as to destroy the testator's free agency. It must be such as would subjugate the mind of the testator to the person operating on it.

The influence of a wife or children is not undue; nor is importunate persuasion from which a delicate mind would shrink. And no evidence of influence is sufficient which is not shown to exist at the very time of making the will. In this, also, as in mental unsoundness, the court is the judge whether the evidence is sufficient to show undue influence, and it is error to allow the jury to decide the question of its sufficiency.

A leading case on this branch of the subject (*Tawney* v. *Long*, 26 P. F. S., 115), which was decided a little over ten years ago, presents some interesting facts.

The decedent was 86 years old when he made his will, and died the following year. He bequeathed $200 to a nephew, and the balance of his estate to a nephew of his wife, whom he made his executor.

The testator had separated from his wife, who sued for maintenance, which was granted by the court. After his death, his will was contested by his daughter and her husband, and they contended that the will was made under the influence of the executor, with whom the decedent lived. The testimony produced by the contestants was to the effect that the executor helped the decedent in his litigation, went with him to his attorney, attended to his business, importuned him frequently to make a will in his favor. Also that the testator had insane delusions about his wife, and was influenced to believe that she maintained improper relations with his son-in-law, that his daughter (the contestant) was not his child, and that both his wife and daughter were improper characters.

The judge who tried the case submitted the question, whether this evidence was sufficient to raise the presumption of undue influence, to the jury, who found that it was. But the Supreme Court reversed the judgment, saying that the evidence was wholly insufficient, and should have been rejected.

From a consideration of these principles we can see that wills are much safer than is popularly supposed; they are not altogether left to the ignorance or prejudice of juries, but are protected by the courts, which can apply to each case the principles governing it, and which form inflexible rules for a certain given state of facts.

It is often stated that there is not much use in making wills, for they are so easily broken. As I have said before, it is not possible to prevent contests under our present laws, any more than it is possible to prevent an innocent man from being *charged* with a crime. But to make a successful contest is a different matter.

In the years 1883, 1884 and 1885, there were probated by the Register of Wills in this county, 3971 wills, an average of 1324 per year. In the same time there were 66 wills contested, an average of 22 per year. Out of this total number of contests only 6 were set aside, and refused probate, making a proportion of 1 to 11 in the total contests, and 1 to 662 in the total of probate.

Of these six (6) cases, two showed undoubted evidences of mental unsoundness, and all parties in interest joined in the request to set them aside; a third was a married woman's will, which had but one witness beside her husband (the law excluding him from being a witness in such case); a fourth was decided upon the testimony of the subscribing witnesses, which showed insanity, and there was no further effort made to probate it; and the remaining two were set aside upon the evidence, after a long and bitter contest.

There were only four cases in which issues of fact were sent to the Common Pleas Court to be tried by a jury. The remaining 56 contested wills were admitted to probate. Appeals were taken to court in 16 of these, but in no case, as far as I can learn among those disposed of, has the will been set aside by the court. A number of the 66 contested cases were small, and were settled in a very short time; in some others, there was no contest before the Register, but appeals were taken, in order to have the cases heard by the court, and to obtain testimony which could not be produced before the Register. The majority of contests lasted only a few months; 3 or 4 occupied over a year, and one case began in May, 1883, and was ended in December, 1885.

And now the question naturally presents itself, Is there any remedy or preventive for contests, that ought to be suggested, which could receive legislative sanction? People say that even the wills of eminent lawyers, carefully drawn by themselves, are attacked, whether successfully or not, they do not stop to consider. Among others, we have read that the will of Samuel J. Tilden, although probated, is the subject of a contest before the court. Would it be advisable, in view of the expense entailed and of the delays and inconveniences of such contests, limited in number though they be, that some legislation should be enacted by which legal safeguards could be thrown around wills made with certain formalities?

In France, I believe, a will is drawn and executed before a notary (a different person from our notary) and left with him, and after death is carried into effect, no other probate being necessary. In New York, a year or two ago, a bill was introduced into the Legislature, providing for ante-mortem probate of wills, but it did not become a law. At that time some newspaper discussions took place here about it, and the opinions of a number of persons were taken as to the advisability of such a law.

It has been suggested that a law might be passed enabling a testator to notify his relatives that he was about to make his will, and without disclosing its contents to ask them to pass upon his sanity.

Another suggestion is, for all wills to be formally executed and acknowledged before some officer authorized to perform such a duty. In view of the fact, however, that some persons have a mania for making wills and codicils, and others find it desirable and necessary to make alterations to meet the requirements of changed surroundings and circumstances, there might be some difficulty in deciding upon any plan which would give less trouble than the present system.

These few suggestions have been thrown out for thought and discussion; and in thus concluding this paper, I will only add that, whether discussed here or pondered over hereafter, I will not consider the treatment of the subject as entirely valueless, if, from the principles of law laid down, and the facts and figures collated, any of us are induced to believe in the advisability of preserving through life a "*Mens sana in corpore sano.*"